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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 101

UNITED STATES OF AMERICA, APPELLANT

v.

WARD BAKING COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 125) is not yet reported.

JURISDICTION

Final judgment in this case (R. 129) was entered on December 10, 1962 and the United States filed a notice of appeal on February 4, 1963 (R. 133). Probable jurisdiction was noted on June 10, 1963 (R. 143; 374 U.S. 803). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Parke, Davis & Co.*, 365 U.S. 125.

STATUTES INVOLVED

The Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*, provides in pertinent part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> * * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *

The Clayton Act, Section 5(a), 38 Stat. 731, as amended, 15 U.S.C. 16, provides as follows:

> SEC. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That

this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

QUESTION PRESENTED

After consent decree negotiations in a civil antitrust suit had reached an impasse, the appellees requested the district court to enter an injunction which was narrower than that sought by the government. The question presented is whether the district court erred in entering the judgment proposed by the appellees, without the government's consent and without trial of the issues presented by the complaint.

STATEMENT

On July 21, 1961, the United States filed a complaint in two counts charging five bakery companies (the appellees) with combining and conspiring to allocate among themselves the business of supplying bakery products (defined as bread and rolls) to federal naval installations in the Jacksonville, Florida area, and to submit noncompetitive and rigged bids and price quotations on such business (R. 1–9). Count I charged that such conduct violated the False Claims Act (31 U.S.C. 231–233), and sought forfeitures and double damages as provided in that Act (R. 3–6). Count II charged that the conduct violated Section 1 of the Sherman Act, and sought the following relief: (1) an adjudication that appellees had violated that Act; (2) an injunction prohibiting appellees from allocating among themselves the business of supplying bakery products to federal naval installa-

tions in the Jacksonville area and submitting rigged bids for such business; and (3) "such further, general, and different relief as the nature of the case may require and the Court may deem appropriate * * *" (R. 6-9).

In March 1961, prior to the filing of the complaint, two related indictments had been returned in the court below. The five appellees were charged, in Case No. 11677-Crim-J, App. *infra*, p. 40, with violating Section 1 of the Sherman Act by committing substantially the same acts as were charged in Count II of the civil complaint. Four of the appellees and two other companies were charged, in Case No. 11676-Crim-J, App. *infra*, p. 35, with conspiring to fix the price of bread and rolls on sales to nongovernment "wholesale accounts," defined as "grocery stores, supermarkets, restaurants, hotels and similar large purchasers". In these two criminal cases, all defendants were convicted on their pleas of *nolo contendere* and fines were imposed.[1]

In the present civil case, settlement negotiations resulted in the parties' agreement to dispose of Count I by the appellees' payment of $44,000 (R. 42, 60).

The parties were unable to agree upon the terms of a consent decree to settle the Sherman Act count. At a pretrial conference on May 8, 1962, the appellees submitted a "Motion for Entry of a Consent Judgment" together with a copy of their proposed judg-

[1] District Judge Simpson accepted the *nolo* pleas over the government's objections. In opposing acceptance of the *nolo* pleas, government counsel briefly discussed the facts involved in the cases, but did not present in any detail the evidence which would have been introduced at trial.

ment to which the government had not consented (R. 34). The motion stated that the judgment was "framed in the language used by the Plaintiff in its prayer for relief" and that the judgment provided "every safeguard" needed to prevent and restrain the alleged violations (R. 36). The proposed judgment enjoined each of the appellees from agreeing to submit "noncompetitive, collusive or rigged bids, or quotations for supplying bakery products [defined as bread and rolls only] to United States Naval installations in the Jacksonville area," or to "[a]llocate, divide or rotate the business of supplying" bread and rolls to such installations; and from "disclosing to or exchanging with any seller of [bread and rolls]" its intent to submit or not submit a bid, or the terms of any such bid for supplying bread and rolls to such installations. The proposed judgment also required each appellee to submit a sworn statement of noncollusion with every bid for bread and rolls submitted to any naval installations in the Jacksonville area for three years after entry of the judgment (R. 39–40).

The terms upon which the government was prepared to settle the case were embodied in a proposed judgment which had previously been submitted to defendants and which was presented to the court at the hearing on May 8. The government sought an injunction against fixing of prices, rigging of bids, or allocation of customers, on sales of any bakery products to any person (R. 74); against urging or requiring any seller of bakery products to adhere to a particular resale price (R. 75); and against disclosing to

or exchanging with any seller of bakery products information on bids (R. 75). It also sought statements of non-collusion for five years on bids for any bakery products to any governmental agency (R. 75–76).

At the conclusion of the hearing on May 8, the court ordered the government to show cause why appellees' proposed judgment should not be entered (R. 44). The government filed objections and a supporting brief. The appellees then moved for "leave to file an amended motion for entry of consent judgment" (R. 52). Attached to their motion papers were an "Amended Motion for Entry of Judgment" and a proposed judgment. This amended judgment made two changes in appellees' original proposal: (1) its scope was broadened to cover all bakery products, not only bread and rolls; and (2) the prohibition against allocating business and rigging bids on sales to naval installations in the Jacksonville area was extended to all sales to the United States, its agencies or instrumentalities (R. 127–129). Subsequently, at the hearing on the show cause order, appellees agreed to increase the period during which they would be required to submit sworn statements of non-collusion from three to five years (R. 112, 115).

The government filed a second brief opposing entry of the proposed amended judgment. The government contended that that judgment was still inadequate because (1) the prohibition against conspiring to fix prices of bakery products covered only sales to the federal government; and (2) there was no injunction against the appellees "urging or suggesting to any seller of bakery products the quotation or charging

of any price or other terms or conditions of sale of bakery products."[1] In these circumstances, the government urged that the court could not terminate the case by entry of judgment without either the government's consent or a trial of the merits (R. 120–124).

The district court entered appellees' proposed amended judgment, which recited that it was entered "without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony" (R. 129). The court held that "[b]ased upon this court's knowledge of the facts involved in Case No. 11677-Crim-J [see n. 1, *supra*] and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint"; and that the judgment "appears to provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint * * *" (R. 128). The court stated (R. 128) that the government's "demand [for] * * * the two controversial provisions * * * does not have a reasonable basis under the circumstances here present" and constituted "arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act * * *."

[1] The government agreed to a modification of this proposed provision to permit the appellees to print the suggested retail price of their products on the package (R. 60).

SUMMARY OF ARGUMENT

The district court erred in terminating the government's civil antitrust case prior to trial and over the government's objection by entering a judgment containing less relief than the government was seeking. The nature of antitrust litigation is such that a district court cannot in normal course determine the scope of appropriate relief without hearing evidence on the particular facts of the violation and the circumstances relevant to an appropriate remedy. In the present case, in particular, the district court had no adequate basis for concluding that the United States would not be entitled to the relief it sought after trial. The government made clear to the court that it was seeking at least two provisions not covered by the proposed judgment: one prohibiting price-fixing with regard to sales to third parties and the other forbidding certain attempts to set the price on resale of the defendants' bakery products. There was no justification for concluding, prior to trial, that the other provisions were adequate or that the additional items could not be found warranted upon trial of the allegations of the complaint.

Although the district court's opinion suggests that the court drew upon knowledge, from pretrial and other proceedings, of what the evidence would in fact show, that is not an adequate basis for denying a party the opportunity to show additional facts or to disprove the initial impressions of the judge trying the case. Nor can the judgment below be sustained on the ground, vigorously argued by the defendants below, that no evidence admissible on the issues of violation or relief under the allegations of the com-

plaint could warrant the relief sought. It is plain that the government could in fact justify the relief it sought under the allegations of the complaint. Finally, the judgment below cannot be sustained as a legitimate sanction for and consequence of the failure of the United States to reveal to the court the specific nature of the evidence which would sustain the relief it sought, for the record and the district court's opinion both show that the court never ordered the United States to make such a showing and did not base its judgment in any way upon a failure to comply with such an order. Moreover, there is grave doubt as to whether the district court would have authority to enter such an order as part of a pretrial hearing under Rule 16 of the Federal Rules of Civil Procedure.

Finally, Section 5 of the Clayton Act, which provides that consent decrees shall not constitute *prima facie* evidence in a later damage action, does not justify the action of the district court in this case. That provision was added to save the government needless expense by encouraging defendants to enter into consent decrees prior to trial. It was never intended to superimpose judicial control on the processes of free negotiation between the parties, which have always been recognized as the only appropriate mechanism for settlement of litigation prior to trial. *Swift & Co.* v. *United States*, 276 U.S. 311, 331–332.

ARGUMENT

THE DISTRICT COURT IMPROPERLY TERMINATED THIS ANTITRUST CASE BY ENTERING THE JUDGMENT PROPOSED BY THE APPELLEES, PRIOR TO TRIAL AND OVER THE GOVERNMENT'S OBJECTION

INTRODUCTION

In this case the district court, "without trial or adjudication of any of the issues of fact or law herein" (R. 129), terminated a government civil antitrust case over the government's objection by entering a judgment proposed by the appellees which did not contain two provisions that the government deemed necessary if the case were to be settled instead of proceeding to trial. The court did so because it concluded, on the basis of its "knowledge of the facts involved" in the related criminal case charging the same offense (in which the appellees had pleaded *nolo contendere*) and on "this record," that such judgment "provides all the relief to which the plaintiff would be entitled * * * after a trial on the allegations of this complaint" (R. 128).

There is nothing in the Federal Rules of Civil Procedure which permits such an extraordinary result of an antitrust case. The Rules provide a procedure for testing whether *any* relief could be granted: a pretrial motion under Rule 12(b)(6) to dismiss the complaint on the ground that, even if all the allegations in the complaint were established, the plaintiff would still be entitled to no relief. But if the complaint states a cause of action upon which some relief can be granted, the case can normally terminate

only in one of two ways: (1) by a decree to which both parties consent; or (2) by an adjudication of the merits based upon a trial or the defendant's admission of the allegations of the complaint.

Consent decrees are an important weapon in the administration of the antitrust laws. Such a disposition may save large expenditures of time, energy and funds, including the time and energy of the courts. The possible savings are often a factor in determining what relief, by way of consent decree, the government may accept.

The responsibility for consent decree negotiations is vested solely in the Attorney General, and his decision to offer, accept or reject any particular terms of settlement is not open for judicial review. Pretrial proceedings in a district court may be used to prevent waste of the court's time or abuse of its process, but they carry no license to review consent decree negotiations in antitrust cases and then pass judgment upon the correctness or even the reasonableness of the government's position. It was entering upon the latter course, we fear, that led the district judge into error in the present case; and it was the danger that such a course would become real that led the government to take this appeal. Nor is this solely a matter of keeping separate the respective functions of the executive and the courts. Any use of inconclusive negotiations for consent decrees as a basis for entering decrees without trial and without consent would quickly tend to inhibit negotiations in future cases. A decree that is suitable as a means of saving time, effort and expense in the preparation

of a case may be utterly inadequate after they are expended.

Not only is the suitability of particular relief dependent upon whether and when there is consent, but the appropriate scope of the relief may also depend upon whether there is an admission or adjudication of guilt. The admission or adjudication of an antitrust violation is often an effective sanction which operates as part of the remedy and bears upon the sufficiency of other relief.

We do not urge that a district court may never conclude, prior to trial and without hearing evidence, that the relief the complainant seeks over and above the consent judgment offered by the defendant is so foreign to any remedy that might conceivably be justified under the evidence that the complainant says he will offer as to enable the court to say that nothing could be developed under the offer which could possibly justify the additional relief. Such a case might arise, to cite a clear example, if the government were foolishly to request an injunction ordering the defendant to bargain collectively with the representatives of its employees as part of the remedy for a conspiracy to divide marketing territory. We assume that if a defendant was willing to accede to a decree containing the only relief to which the complainant could conceivably be found entitled upon the most optimistic development of its intended proof, including an admission or adjudication of past violations, then the district court might properly enter the decree without wasting its time in hearing the evidence.

It is also unnecessary to consider, in the present case, the soundness of our view that the government is always entitled to an adjudication or admission of past violations as part of the relief. Here the government was denied more than an adjudication of the alleged violations. The district court denied, without a trial, two important items of preventative relief. Nor is the case one in which it could be said as a matter of law that the government could not possibly be entitled to the disputed provisions even if it prevailed on the merits and showed that extensive violations had resulted from a virulent disposition to engage in restraints of trade. On the contrary, it is plain that the evidence which the government proposed to introduce with respect to the character of the past violations and the need for relief could amply justify a court in granting the disputed provisions. At this preliminary stage of the case and without knowing any of the detailed facts, the district court had no adequate basis for concluding that the relief proposed by the appellees would "provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint" and therefore was all the government could obtain "after a trial on the allegations of this complaint" (R. 128).

A. JUDICIAL DETERMINATION OF THE SCOPE OF ADEQUATE INJUNCTIVE RELIEF IN AN ANTITRUST CASE REQUIRES FULL DEVELOPMENT OF THE NATURE AND EXTENT OF THE VIOLATIONS

"A full exploration of facts is usually necessary in order properly to draw * * * a decree [in an

antitrust case]" (*Associated Press* v. *United States*, 326 U.S. 1, 22). Thus, the very nature of the inquiry required for determining the scope of proper relief in an antitrust case bars a district court from attempting to exercise its discretion unless and until all the facts have been fully developed. Prior to trial the district court has before it none of the facts necessary for this determination.

The court must identify the "illegal conduct" before it can determine how to "cure the ill effects" thereof, and prevent "its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88). This evidence is fully developed in the course of trial of the merits of the violations charged in the complaint. It can only be hypothesized and very roughly approximated prior to trial. Further, in formulating appropriate injunctive relief, the court often hears evidence that goes beyond what would be needed to establish violations of law, and may conduct a separate hearing on relief.[8] It will seek to determine the means by which the violations were committed and will explore related practices. As this Court has stressed, "relief, to be effective, must go beyond the narrow limits of the proven violation" (*United States* v. *United States Gypsum Co.*, 340 U.S. at 90), and may prohibit "otherwise permissible practices connected with the acts found to be illegal" (*United States* v. *Loew's, Inc.*, 371 U.S. 38, 53). The nature of such evidence bearing on appropriate relief cannot be discovered merely from the pleadings. The proper

[8] See *United States* v. *du Pont & Co.*, 353 U.S., 586, 607; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 85.

scope of an equity decree intended to prevent future wrongdoing generally depends upon such factors as the history, development and extent of the wrongdoing; its duration and intensity; whether it was an isolated infraction or part of a larger scheme; the responsibilities of the individuals involved—whether the wrongdoing was company policy formulated or approved by the highest executives or independent misconduct of subordinates; and the state of competition in the industry. This range of relevant matters cannot be effectively enclosed in the district court's speculations as to what evidence might be forthcoming under the allegations of the complaint. To support an antitrust decree, absent consent of the parties, the court must make and file findings on the material facts, which "constitute the grounds of its action" (Rule 52(a)).[4]

Beyond this, a district court in antitrust litigation has "a wide range of discretion * * * to mould the decree to the exigencies of the particular case"

[4] Judicial findings under Rule 52(a) are not required for a consent decree because the parties' consent estops them from appealing and relieves the court "of the very necessity of making a supporting record. A decree rendered by consent 'is always affirmed, without considering the merits of the cause.'" *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323; *Swift & Co.* v. *United States*, 276 U.S. 311. Therefore, judicial entry of a consent decree is limited to the precise terms of the parties' agreement (see *Swift & Co.* v. *United States*, 276 U.S. at 315; *Sawyer* v. *Mid-Continent Petroleum Corp.*, 236 F. 2d 518 (C.A. 10); *In re Clark*, 176 Fed. 955 (N.D.N.Y.); *United States* v. *Hartford-Empire Co.*, 1 F.R.D. 424, 427 (N.D. Ohio)). Any judicial modification of a consent decree, over the objection of a party, requires "a hearing that included evidence and a judicial determination based on it" (*Hughes* v. *United States*, 342 U.S. 353, 357, 358).

(*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185). That discretion cannot be wisely exercised on the basis of hypothetical abstractions. The events and actors must be made to live again before the court can visualize the conspiracy in its full significance. For example, appraisal of the company's "proclivity for unlawful conduct," a factor highly relevant to the breadth of relief (*United States* v. *Paramount Pictures*, 334 U.S. 131, 148), may require inferences about the virulence of the conspiracy and the character and motives of the individuals involved—inferences which depend upon seeing and hearing witnesses. *Arguendo* assumptions on such matters are not a substitute for factual evidence.[8]

These reasons led the district court, in *United States* v. *Hartford-Empire Co.*, 1 F.R.D. 424, 427 (N.D. Ohio), to reject an attempt by defendants, similar to the effort here, to have the court terminate an antitrust case before trial by entering "consent" judgments to which the government had not consented. The court pointed out (p. 429):

> * * * The court does not now know and cannot pre-judge what the testimony in this case

[8] Findings of fact on these issues are also an essential aid to the appellate court in reviewing an equity decree in an antitrust case. "The relief granted by a trial court in an antitrust case * * * has always had the most careful scrutiny of this Court" (*International Boxing Club* v. *United States*, 358 U.S. 242, 253), and findings on the evidence are essential for the Court to fulfill its "duty to examine the decree in light of the record to see that the relief it affords is adequate to prevent the recurrence of the illegality which brought on the given litigation" (*United States* v. *Loew's, Inc.*, 371 U.S. 38, 52). See also, *Schine Theatres* v. *United States*, 334 U.S .110, 125.

> will disclose; therefore, he cannot anticipate what form of relief he would deem to be wise, expedient, and necessary to be entered into a decree, if it be found that some or all or substantially all of the allegations of the complaint are sustained. Hence the court cannot now say that the proposed decree would satisfy everything requested in the prayer. * * *
>
> * * * Until the record contains facts upon which conclusions may be based, the court feels that he would do wrong and commit error to anticipate facts and approve one or all of the proposed decrees at this time.

The court also stated (p. 427) that even assuming that the injunctive provisions proposed in one of the decrees "would be all that might be deemed necessary after the facts have been submitted, is the court actually now in a position to so determine and prejudge? * * * I am of the opinion that an impossible situation would be reached by sustaining and signing such a proposed decree in anticipation of what the facts may be."[*]

The adequacy of relief is thus a matter which can properly be decided only upon the facts, beginning with detailed evidence of the nature and extent of the conspiracy. To be sure, a district court may strike from the complaint a particular prayer for relief, if not authorized as a matter of law (*e.g., Clay*

[*] For similar reasons, in the pretrial stage of *United States* v. *Loew's, Inc.*, 189 F. Supp. 373 (S.D.N.Y.), reversed in part, 371 U.S. 38, when defendants sought a resolution of issues pertinent to relief and requested a separate and preliminary trial to that end, the district judge denied the request, stating that he was "unable to dispose of the issue of the relief demanded in the absence of proof as to the facts" (189 F. Supp. at 377).

v. *Calloway*, 177 F. 2d 741 (C.A. 5)). But the kind of inquiry sufficient to determine whether requests for particular relief should be stricken is not sufficient to enable the tribunal to decide affirmatively in advance of trial what form of decree will be adequate to remedy the violations charged.[1] Nor, it is important to note, can this gap in the court's knowledge be filled by reference to the relief requested by the United States for settlement of the case. To avoid the risks and burdens of trial the government may be willing to accept a consent decree granting less relief than it believes would be warranted by the facts which could be proved at trial. The government's statement of the terms upon which it is willing to settle a case thus cannot be equated with the relief which it would deem adequate after trial. There is, in short, no substitute for a full determination of the relevant facts if

[1] For this reason a recent antitrust decision, relied upon below, *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis.), is sharply distinguishable from the present case. The district court there entered a judgment containing all the injunctive relief sought by the government during consent decree negotiations. It ruled, as a matter of law, that the government was not entitled to an item of non-injunctive relief it sought (a provision that the decree would have prima facie effect in certain private cases). The district court assumed, we believe erroneously, that the government had conceded that no injunctive relief beyond that demanded for a consent decree would be appropriate after trial. In contrast, in this case, there is plain disagreement on the scope of the injunction.

Contrary to *Brunswick*, we believe that the government is entitled to an adjudication of alleged antitrust violations as a means of enforcement of the antitrust laws. See *United States* v. *Parke, Davis & Co.*, 365 U.S. 125, and the government's Jurisdictional Statement, and Brief in Opposition to Motion to Dismiss or Affirm in that case, No. 526, O.T. 1960.

a district court is effectively to exercise its discretion to determine the proper scope of relief in an antitrust case.[8]

B. IN THE PRESENT CASE THE DISTRICT COURT HAD NO BASIS FOR CONCLUDING THAT THE UNITED STATES WOULD NOT BE ENTITLED TO THE RELIEF IT SOUGHT AFTER TRIAL

1. The court below rested its decision on two grounds: *first*, that the government's demand for the additional provisions "does not have a reasonable basis under the circumstances here present" (R. 128); and *second*, that, without the additional provisions, the judgment provides "all the relief to which the plaintiff would be entitled * * * after a trial on the allegations of the complaint," a conclusion stated to be "[b]ased upon this court's knowledge of the facts involved in Case No. 11677-Crim-J and this record" (R. 128). Although the court's statement suggests that its decision was based, both on the insufficiency of the government's allegations to justify further relief, and upon the court's knowledge of what the government would in fact be able to prove to the satisfaction of the court, we believe that only the former ground warrants extended discussion. There can be no doubt that the district court was without power to find the facts on the basis of personal knowledge and without permitting the government to introduce evidence. It is equally clear that the district court was without power to determine the scope of appropriate relief without finding the facts or permitting trial of the

[8] It is hardly necessary to add that any use of the terms of the government's proposed consent decree to limit the government's demands for relief after trial would severely interfere with the course of negotiations for a consent decree.

factual issues merely because it had reached *a priori* conclusions as to what the facts would ultimately show.' We shall therefore discuss at length only the question whether the district court could properly conclude that, as a matter of law, the government could not be entitled to the additional relief it sought after a trial of the allegations of its complaint.

2. The government's prayer for relief asked for certain specific provisions covered by the judgment entered by the court, plus such additional relief as the facts developed at trial would warrant. In the course of pre-trial proceedings the government made clear to the court that this additional relief would include at least two provisions not in defendants' proposed judgment—one prohibiting price-fixing with regard to sales to third parties and the other enjoining the appellees from "[u]rging or suggesting to any seller of bakery products the quotation or charg-

'The pretrial proceedings here involved settlement of the False Claims Act count, various motions of appellees addressed to the pleadings, and the defendants' motions for entry of judgment which arose from the unsuccessful consent decree negotiations. In the course of these events, the court below heard various contentions and representations of counsel concerning the case. Nothing in these discussions provides any foundation for the court's belief that it had "knowledge of the facts involved" and could make a factual appraisal of "the circumstances here present" (R. 128). The same is of course true of the discussions with counsel in the prior criminal case in which defendants pleaded *nolo* to charges of rigging of bids and allocation of business on the government sales involved in the complaint here, see fn. 1, *supra*, p. 4. It is noteworthy that, while ruling that the government was "arbitrary" in requesting relief against price-fixing to the general public, the judge did not refer to the second prior criminal case over which he presided (see p. 4, *supra*), in which defendants pleaded *nolo* to price-fixing on sales to non-government accounts.

ing of any price or other terms or conditions of sale of bakery products" (R. 74–75). We submit that the government was entitled to proceed to trial to obtain these items of relief if the evidence it could offer under the complaint, either on the issue of liability or on the issue of relief, could justify the district court in granting the relief sought. There can be no real question that the government's complaint was broad enough to permit offering such evidence in the instant case.

The government's complaint alleged that, over a four-year period, the defendants had conspired and acted "[t]o submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area" (R. 7). The means adopted were alleged to include the following (R. 4):

> Representatives of the defendants held meetings and conferred by telephone for the purpose of allocating among the defendants the business of supplying bakery products to United States Naval installations in the Jacksonville area. The business was allocated in such a manner as to provide each defendant with the business for a designated quarterly period of the year. When invitations to bid were received from the Naval installations in the Jacksonville area, said representatives would again meet and confer and the representatives of the defendant designated for the particular period would declare the prices which that defendant intended to bid. The others would agree to bid higher prices and thus protect the bid of the designated low bidder.

All the injunctive provisions involved in this case are within the general scope of permissible relief against the violations alleged in the complaint. Thus, while the complaint charged rigging of bids only on sales of bread and rolls to naval installations in Jacksonville, appellees agreed to accept a prohibition against rigging of bids on sales of any bakery products to any federal agencies anywhere in the country. Such an injunction might have been found appropriate by the district court after trial, if it appeared, for example, that the alleged conspiracy had been authorized or participated in by high-level management in charge of sales throughout the country.

In the same way, the facts concerning the alleged violations might have been found to support the government's right to the disputed clauses—an injunction against allocating business and fixing prices on sales to non-government customers, and against urging or suggesting resale prices. It may appear, for example, that the government bids bore a fixed relation to the level of prices on sales to non-government customers or to the level of retail prices, or that the management personnel of the appellees who authorized or participated in the bid-rigging conspiracy had responsibility for all other sales as well. The additional provisions sought by the government might well turn out to be necessary to assure the public freedom from the continuance of similar illegal conduct in other markets under the supervision of that management. Cf. *United States* v. *United States Gypsum Co.*, 340 U.S. at 88. "It is a salutary principle that when one has been found to have committed acts in violation of a

law he may be restrained from committing other related unlawful acts" (*National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, 436).

Even if the facts proved in order to establish the violation charged were not themselves sufficient to justify all the relief sought by the government, the proof of violation might make appropriate further evidence bearing on the scope of relief. Thus, for example, four of the five defendants had in fact been adjudged guilty of price-fixing to nongovernment accounts as well as of bid-rigging on government sales, *supra*, p. 4.[10] Similarly, any evidence of violations by the same defendants in other parts of the country or of violations involving the maintenance of resale prices would be relevant on the issue of relief even if not admissible on the issue of violation.

In short, the district court could not have properly ruled that no evidence which the government might have introduced could possibly justify the two provisions at issue. The court, of course, might conclude after trial that the provisions were unnecessary, but that determination would represent an informed exercise of judicial discretion, based upon all the facts of the case. But the court had no basis for making the determination, at this preliminary stage of the case, that the judgment provided the government "with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman

[10] The government did not file and does not intend to file an additional suit for injunctive relief against the four appellees convicted in the nongovernment case. We therefore regard the final injunction to be entered in this suit as the appropriate vehicle for any injunctive relief intended to prevent a repetition of that offense.

Act as set forth in the complaint" and that "the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint" (R. 128).

3. Appellees contend (Motion to Affirm, pp. 6–12), however, that the district court was justified in entering their proposed judgment because of the failure of the United States to tender either evidence or more specific allegations in response to the order to show cause why it should not be entered. The short answer is that the district court never directed the United States to make additional and more specific allegations to supplement an already adequate complaint. It never requested the United States to detail or tender whatever evidence the government proposed to enter supporting its charges. Rather, it directed the government to respond to the defendants' contentions, made increasingly explicit during the pretrial proceedings, that no evidence introduced at trial could possibly warrant the relief the government was seeking.

Thus, the defendants argued in their amended motion for entry of judgment that "if the court granted injunctive relief of a greater scope that that set forth in the proposed judgment, such relief would not have a constitutional or statutory basis in this action" (R. 56). They stated on oral argument (R. 100–101):

> Then after the defendants received the brief and the statement of objections, we sat down

> and honestly tried to figure out what the broadest possible injunction was that the Court would be able to grant on the cases if Mr. Stuckey [government counsel] was able to prove everything he alleged in his complaint and bring in all evidence on the relief which would in any way be admissible in this state of the pleadings and under the case as it's filed before Your Honor.

They bottomed their demands for a judgment denying the government part of the relief it sought squarely on the legal proposition that "we have, in this amended judgment, given the relief which the furthest relief or the broadest circle of relief that the Court could grant at a trial of this case" (R. 96).

The government responded to these legal contentions by arguing, *inter alia*, that relief in addition to that agreed to by the defendants, including the specific provisions demanded by the government, could be warranted by the district court's findings after trial of the issues posed by the complaint and answer, (R. 90–92, 122–124). This response raised a legal issue identical to that discussed under Point B(2), *supra*, pp. 20–24. At no time during the pretrial proceedings, including the hearings at which he discussed with the parties at some length the nature of the issues before him, did the district judge directly and specifically request the government to describe in greater detail the factual basis for the relief it sought.

Although the defendants occasionally made the argument that "If the Government had admissable [sic] evidence going beyond the facts plead showing a legal need for broader relief, then it should have

set this out specifically in answer to the rule nisi" (R. 122; see also R. 106–107), this argument could not convert the legal issues posed by the Order to Show Cause into a wholly unstated order to make discovery of all the evidence on which the government intended to rely. That the government was correct that it "was under no duty to reveal all of its evidence in answer to the rule nisi" (R. 123) is evident from the district court's opinion. For the court's opinion, like its oral discussion at the pretrial hearing, never so much as mentions the alleged failure of the United States to obey an implied discovery order of the court. It is based solely on the court's own knowledge of the facts plus the defendants' legal arguments that the complaint was insufficient to sustain broader relief than that to which they had consented. The court held simply that the defendants' proposed judgment would "provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint" and would provide "all the relief to which the plaintiff would be entitled • • • after a trial on the allegations of this complaint" (R. 128).

Moreover, it is extremely doubtful whether a pretrial order having the effect suggested by the appellees would have been justified here at all. Pretrial conferences under Rule 16 play a valuable role in developing and setting forth areas of agreement between the parties, thus narrowing and defining the contested issues for trial and facilitating proof at trial. But Rule 16 "calls for a *conference* of counsel with the

court to *prepare* for, not to avert, trial" (*Padovani* v. *Bruchhausen*, 293 F. 2d 546, 548 (C.A. 2), emphasis in original); "pre-trial proceedings are intended to determine what the issues are, and not to invade the trial function of resolving those issues" (*Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 176 F. 2d 90, 92 (C.A. 3); see *Lynn* v. *Smith*, 281 F. 2d 501, 506 (C.A. 3); *Clay* v. *Callaway*, 177 F. 2d 741, 743 (C.A. 5); *Seminar on Protracted Cases*, 23 F.R.D. 319, 509–510).

Where a district court is faced with triable issues, summary disposition of the case is improper. The court is precluded from deciding factual issues on counsel's pretrial representations, instead of on the evidence at trial. (*Wirtz* v. *Young Electric Sign Co.*, 315 F. 2d 326 (C.A. 10); *Lynn* v. *Smith*, 281 F. 2d 501 (C.A. 3); *Clay* v. *Callaway*, 177 F. 2d 741 (C.A. 5)). It may not turn pretrial into "a substitute" for trial, and seek to develop the facts at pretrial by hearing witnesses (*Lynn* v. *Smith*, 281 F. 2d at 504, 507). And it may not terminate a case because of its hypothetical view as to the conclusion it would reach on disputed issues after trial of the case (*Lynn* v. *Smith*, *supra*; *Wirtz* v. *Young Electric Sign Co.*, 315 F. 2d at 328). Failure to comply with a proper pretrial order directing disclosure of a party's legal theory or underlying evidence may, in an appropriate case, justify dismissal of the case or disciplining of the counsel responsible;[11] but it would not support the judicial reso-

[11] See the discussion of the court's disciplinary powers in *Gamble* v. *Pope & Talbot, Inc.*, 307 F. 2d 729 (C.A. 3). The limits upon the court's authority to compel disclosure are indicated in *Padovani* v. *Bruchhausen*, 293 F. 2d 546 (C.A. 2),

lution of contested issues undertaken by the court in this case.

Finally, requiring the government to produce at a pre-trial hearing evidence to justify the relief it seeks would not be an appropriate procedure. As we have shown, judicial determination of what relief is necessary ordinarily requires complete knowledge of the detailed facts of the case. For the court to attempt to ascertain such facts at a pre-trial hearing on relief would turn such hearing into virtually a full-scale trial of the merits. Mere generalized statements by government counsel of what the evidence would show, or even relatively detailed offers of proof, would not give the court a sufficient factual basis to permit the kind of informed judgment upon which the formulation of relief depends. For such a judgment requires the drawing of subtle inferences from all of the facts surrounding the violation, and there is no effective substitute for a trial as the means of developing the facts.

C. SECTION 5 OF THE CLAYTON ACT DOES NOT SUPPORT THE DISTRICT COURT'S ACTION IN TERMINATING THE CASE WITHOUT TRIAL BY ENTRY OF A JUDGMENT TO WHICH THE GOVERNMENT DID NOT CONSENT

The court below also ruled that the government's insistence upon its own form of injunction as a condition of settlement was "arbitrary and unauthorized

in which the Second Circuit by mandamus set aside a preclusion order entered after the district court had required plaintiff to tender successive detailed statements of factual and legal contentions. The court of appeals ruled that "to force a plaintiff against his will to limit his case beyond the issues he has tendered in his complaint is contrary to the basic principles of the federal rules" (293 F. 2d at 550).

conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties" (R. 128). But there is nothing in the language, legislative history, or basic policy of Section 5 which in any way suggests that it was intended to limit the Attorney General's broad discretion to determine the kind of final injunction that the government will accept without a trial.

Section 5, 15 U.S.C. 16, provides that a "final judgment or decree" in a government antitrust suit "to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant" in a subsequent damage action, subject to the following proviso:

> *Provided*, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *.

The main purpose of Section 5 was to aid treble-damage *plaintiffs* "by making available to them all matters previously established by the Government in antitrust actions" (*Emich Motors* v. *General Motors*, 340 U.S. 558, 568, see 51 Cong. Rec. 13851). The quoted proviso was added to save the government needless litigation expense by encouraging defendants to enter into consent decrees before trial (S. Doc. 584, 63d Cong., 2d Sess., p. 6; 51 Cong. Rec. 15638, 15825, 16276).[12]

[12] The purpose of Congress to exclude even a consenting defendant from the benefits of the Section 5 proviso where the defendant chooses to put the government to its proof is demonstrated by the express requirement that the consent judgment be "entered before any testimony has been taken." It is further

While Section 5 encourages "consent judgments," Congress did not give to any defendant the legally enforceable right to demand a particular form of consent decree prior to trial. The availability and adequacy of a consent judgment was left to the normal process of negotiation and agreement between the parties, subject to judicial approval. A court may, of course, reject a proffered consent judgment, but it cannot impose upon either party a final "consent" judgment granting relief intended to remedy antitrust violations without adjudicating the nature and extent of the violations. Far from restricting the Attorney General's discretion as to settlements, the reference to "consent judgments or decrees" in Section 5 merely shows that "Congress indirectly has recognized the Attorney General's authority to utilize consent settlements to terminate antitrust litigation" (Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess., *The Consent Decree Program of the Department of Justice*, p. 1 (Comm. Print, 1959)).[12]

The Attorney General's broad authority in negotiating settlements was explicitly upheld in *Swift & Co.* v. *United States*, 276 U.S. 311. In that case, the Court

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emphasized by the terms of Section 5, as originally enacted in 1914 (38 Stat. 731). That Act contained a second proviso, applicable to cases then pending, which made the stated prima facie effect inapplicable to consent judgments in pending suits, in which the taking of testimony had been commenced but not concluded, only if the decree were entered "before any further testimony is taken."

[12] At the time Section 5 was enacted, consent decrees had been entered in approximately 12 cases, beginning with the 1906 decree in *United States* v. *Otis Elevator Co.*, 1 Decrees & Judgments 106 (N.D. Cal., 1906).

rejected the contention that an antitrust consent decree was void "because the Attorney General had no power to agree" to a judgment which prohibited the defendants from doing acts which themselves were not illegal. The Court stated (pp. 331–332): "[W]e do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His authority to make determinations includes the power to make erroneous decisions as well as correct ones." The discretion of the Attorney General, as the government's chief law officer, to agree to particular terms in a consent judgment is no less than his discretion to refuse to settle a particular case, except upon the terms he chooses. It is not for a district court to consider whether the Attorney General has made an "erroneous decision" in insisting upon certain terms of settlement. It cannot substitute its discretion for that of the Attorney General as to the appropriate basis for settlement.

The considerations which may properly influence the government in settling an antitrust case are particularly inappropriate for judicial scrutiny. There is necessarily much give and take on both sides, and the resulting compromise depends on a number of factors.[14] The government's primary concern is with

[14] Because of this, the Court has always rejected attempts to utilize the terms of consent decrees as legal precedent: "the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." *United States* v. *du Pont & Co.*, 366 U.S. 316, 330 fn. 12. Defendants in *du Pont* were arguing that in other cases the government had accepted consent decrees with less stringent

the effectiveness of the decree, but it must also weigh the importance of the case, the strengths and weaknesses of the evidence, the likelihood of success both on the merits and in obtaining all of the relief deemed appropriate, and the importance of obtaining an adjudication of the violations charged. Moreover, in recent years, more than 75 percent of all civil antitrust suits brought by the government have been terminated by consent judgments [11] and proper utilization of the government's limited resources is an important factor. The government may, therefore, abandon or modify particular items of relief which it would seek if the case went to trial and it prevailed, solely in order to reach a settlement of the case.

Similarly, from the defendant's side, the acceptability of a settlement involves evaluating various restrictions in the light of the uncertainties and costs of litigation, business exigencies, and other circumstances. There is no compulsion upon a defendant to accept a consent decree proposed by the Attorney General except that provided by the circumstances of the antitrust violations in question. The defendant may in the course of pretrial negotiations obtain the benefit of a narrower injunction than the government might obtain after undertaking the burden of a trial.

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relief than sought against them. The Court's comment indicates recognition, therefore, that the government may settle for less than would be sought after trial, and awarded by a court.

[11] Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess., *The Consent Decree Program of the Department of Justice*, p. 7 (Comm. Print., 1959).

The defendant may also choose to submit to a broad injunction before trial in order to protect itself from the prima facie effect in treble-damage suits which would result under Section 5 from an adjudication of guilt. There may be business reasons for it to avoid the delays and notoriety of a trial. But the proviso in Section 5 does not give a defendant the double privilege of rejecting a pretrial consent judgment proffered by the government and at the same time avoiding an adjudication on the merits of the government's complaint.[16] At most, Section 5 is simply an inducement to defendants to negotiate a pretrial settlement of the suit. If an antitrust defendant regards the government's settlement terms as unreasonable, his remedy, like that of any other litigant who cannot agree upon settlement with his adversary, is to reject the proposal and go to trial.

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[16] Appellees' counsel sought just this privilege in the court below:

"The COURT: Let me say this now: That I'm going to enter your Decree, or the Government's Decree, one, see? I'm going to enter a Decree here. I'm not just going to enter an Order after this thirty days expires, saying that we'd better go on to trial.

"Isn't that understood?

"Mr. DUNLAP [Defense counsel]: No, sir.

"Mr. STUCKEY [government counsel]: No, sir.

"The COURT: It isn't?

Mr. DUNLAP: No, sir, because I think we clearly withheld that at the last hearing. * * * That was the last thing I said and I believe one of the first things we said, that we did not agree that we were foreclosed from a right to go to trial if you decided to enter the Government's Decree" (R. 116–117).

CONCLUSION

For these reasons, the judgment below should be vacated and the case remanded for trial.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK,
Assistant Attorney General.
PHILIP B. HEYMANN,
Assistant to the Solicitor General.
LIONEL KESTENBAUM,
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Attorneys.

SEPTEMBER 1963.

APPENDIX

United States District Court, Southern District of Florida, Jacksonville Division

CRIMINAL No. 11676J

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BAKERIES COMPANY, FLOWERS BAKING COMPANY, INC., FUCHS BAKING CO., HOLSUM BAKERS, INC., SOUTHERN BAKERIES COMPANY, AND WARD BAKING COMPANY, DEFENDANTS

Filed: March 6, 1961

INDICTMENT

The Grand Jury Charges:

I. *Definition of Terms*

1. As used herein, the term:

(a) "Bakery Products" means bread and rolls.

(b) "Florida area" means the area within (1) the State of Florida, and (2) the Southeastern part of the State of Georgia.

(c) "Wholesale accounts" means those grocery stores, supermarkets, restaurants, hotels and similar large purchasers of bakery products to whom the defendants sell bakery products in the Florida area.

II. *The Defendants*

2. American Bakeries Company (hereinafter called "American") is hereby indicted and made a defend-

ant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. It owns and operates baking plants in Jacksonville, Orlando and Miami, Florida, and in various other States.

3. Flowers Baking Company, Inc. (hereinafter called "Flowers") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Thomasville, Georgia. It owns and operates a baking plant in Thomasville, Georgia and a baking plant in Jacksonville, Florida.

4. Fuchs Baking Co., (hereinafter called "Fuchs") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Florida with its principal place of business in Homestead, Florida. It owns and operates a baking plant in Homestead, Florida.

5. Holsum Bakers, Inc., (hereinafter called "Holsum") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Florida with its principal place of business in Tampa, Florida. It owns and operates a baking plant in Tampa, Florida.

6. Southern Bakeries Company (hereinafter called "Southern") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It owns and operates baking plants in Jacksonville, Daytona Beach, Orlando, Tampa, Pensacola and Miami, Florida, and in various other states.

7. Ward Baking Company (hereinafter called "Ward") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. It owns and operates a baking plant in Jacksonville and Tampa, Florida, and in various other States.

8. Whenever in this indictment reference is made to any act, deed or transaction on the part of any defendant corporation, such allegation shall be deemed to mean that the directors, officers or agents of such corporation authorized, ordered, or did such act, deed or transaction, for or on behalf of such defendant corporation while actively engaged in the management, direction and control of its affairs.

III. *Nature of Trade and Commerce*

9. The defendants operate the largest bakeries in the Florida area and during the period covered by this indictment said defendants baked approximately 75% of the bakery products sold in said area. In 1959 total sales by the defendants of bakery products in the Florida area amounted to approximately $23,000,000.

10. During the period of time covered by this indictment, the defendants purchased substantial amounts of flour, sugar, yeast and other ingredients used by them in the production of bakery products from suppliers located in States other than Florida. Said ingredients were shipped by said suppliers from their places of business outside Florida to the bakeries of the defendants in the State of Florida.

11. During the period of time covered by this indictment, each of the defendants operated a baking plant in the Florida area. The defendants American,

Ward and Southern owned and operated trucks which regularly and frequently delivered bread from their bakeries in Jacksonville, Florida to wholesale accounts located in the State of Georgia. Thus, there was a regular, continuous and substantial flow of bakery products in interstate commerce between the bakeries of the defendants American, Ward and Southern in Jacksonville, Florida and their wholesale accounts located in Georgia.

IV. *Offense Charged*

12. Beginning in or about April 1960, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants named herein, together with others to the Grand Jurors unknown, have engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore described trade and commerce in violation of section 1 of the Act of Congress of July 2, 1890, as amended, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

13. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants, and others to the Grand Jurors unknown, the substantial term of which has been that they agree to fix and maintain prices at which bakery products shall be sold to wholesale accounts.

14. During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and others to the Grand Jurors unknown, by agreement and concerted action, have done those things which, as hereinbefore alleged, they conspired

and agreed to do. More particularly, on or about April 29, 1960 representatives of the defendants met together and discussed and agreed upon increased prices to be charged for bakery products to be sold by defendants to wholesale accounts.

V. *Effects of the Conspiracy*

15. The effects of the aforesaid combination and conspiracy have been and are that:

(a) Prices for bakery products sold to wholesale accounts have been fixed at uniform and noncompetitive levels;

(b) Price competition among the defendants in the sale of bakery products in the Florida area has been eliminated, and

(c) Wholesale accounts in the Florida area have been deprived of the opportunity to buy bakery products at competitive prices.

VI. *Jurisdiction and Venue*

16. The combination and conspiracy charged in this indictment has been entered into and carried out in part within the Southern District of Florida where the defendants own and operate baking plants. During the period of time covered by this indictment and within the five years next preceding the return thereof, the defendants, pursuant to said combination and

conspiracy, have committed within the Southern District of Florida many of the acts herein charged.

Dated:

A true bill.

(S) Henry M. Stuckey,
HENRY M. STUCKEY,
Attorney, Department of Justice.

(S) ROBERT L. FINCH,
Foreman.

(S) W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General.

(S) CHARLES L. WHITTINGHILL,
Attorney, Department of Justice.

(S) JOHN BRIGGS,
Assistant United States Attorney.

United States District Court, Southern District of Florida, Jacksonville Division

Criminal No. 11677 J

UNITED STATES OF AMERICA, PLAINTIFF

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC., AND SOUTHERN BAKERIES COMPANY, DEFENDANTS

Filed: March 6, 1961

INDICTMENT

The Grand Jury Charges:

I. Definition of Terms

1. As used herein, the term:

(a) "Bakery products" means bread and rolls.

(b) "Jacksonville area" means the area within (1) the Northern part of the State of Florida, and (2) the Southeastern part of the State of Georgia.

II. The Defendants

2. Ward Baking Company (hereinafter called "Ward") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

3. American Bakeries Company (hereinafter called "American") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

4. Derst Baking Company (hereinafter called "Derst") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Savannah, Georgia. It owns and operates a baking plant in Savannah, Georgia.

5. Flowers Baking Company, Inc. (hereinafter called "Flowers") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Thomasville, Georgia. It owns and operates a baking plant in Jacksonville, Florida, and a baking plant in Thomasville, Georgia.

6. Southern Bakeries Company (hereinafter called "Southern") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

7. Whenever in this indictment reference is made to any act, deed or transaction on the part of any defendant corporation, such allegation shall be deemed to mean that the directors, officers or agents of such corporation authorized, ordered, or did such act, deed or transaction, for or on behalf of such defendant corporation while actively engaged in the management, direction and control of its affairs.

III. *Nature of Trade and Commerce*

8. The defendants operate the largest bakeries in the Jacksonville area and during the period covered by this indictment, said defendants baked approximately 90% of the bakery products sold in said area. In 1959 total sales by the defendants of bakery products in the Jacksonville area amounted to approximately $11,000,000.

9. During the period of time covered by this indictment, the defendants purchased substantial amounts of flour, sugar, yeast and other ingredients used by them in the production of bakery products from suppliers located in States other than Florida and Georgia. Said ingredients were shipped by said suppliers from their places of business outside Florida and Georgia to the bakeries of the defendants in the States of Florida and Georgia.

10. During the period of time covered by this indictment, each of the defendants operated a baking plant in the Jacksonville area. The defendants

Ward, Southern and American owned and operated trucks which regularly and frequently delivered bread from their bakeries in Jacksonville, Florida to wholesale accounts, including United States Government Naval installations, located in the State of Georgia. Thus, there was a regular, continuous and substantial flow of bakery products in interstate commerce between the bakeries of the defendants Ward, Southern and American in Jacksonville, Florida and their wholesale accounts and United States Government Naval installations located in Georgia.

IV. *Offense Charged*

11. Beginning in or about September 1957, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants named herein, together with others to the Grand Jurors unknown, have engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore described trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants, and others to the Grand Jurors unknown, the substantial terms of which have been and are:

(a) To allocate among themselves the business of supplying bakery products to Federal Naval installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to Federal Naval installations in the Jacksonville area.

13. During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and others to the Grand Jurors unknown, by agreement and concerted action, have done those things which, as hereinbefore alleged, they conspired and agreed to do.

V. *Effects*

14. The effects of the aforesaid combination and conspiracy have been and are that:

(a) Competition among the defendants in the sale and distribution of bakery products to Federal Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) Federal Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

VI. *Jurisdiction and Venue*

15. The combination and conspiracy charged in this indictment has been entered into and carried out in part within the Southern District of Florida where the defendants, except defendant Derst, own and operate baking plants. During the period of time covered by this indictment and within the five years next preceding the return thereof, the defendants, pursuant to said combination and conspiracy, have

committed within the Southern District of Florida many of the acts herein charged.

Dated:

A true bill.

(S) Henry M. Stuckey,
HENRY M. STUCKEY,
Attorney, Department of Justice.

(S) ROBERT L. FINCH,
Foreman.

(S) W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General.

(S) CHARLES L. WHITTINGHILL,
Attorney, Department of Justice.

(S) JOHN BRIGGS,
Assistant United States Attorney.

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